1935

Advisory Opinion of the RI Supreme Court Relating to the Constitutional Convention, Part 6 (pp. 389-462)

For	4,393
Against	5,121
Total	9,514

The total vote for representatives in Congress on the same day was 10,205. It thus appears that the vote on this amendment was much nearer the vote cast for public officers on the same day than is usual in the case of votes on constitutional amendments.

This is the last word up to date of the people of Rhode Island to the members of the General Assembly as to whether the General Assembly shall have the right to call a constitutional convention. The people, when the question was squarely presented to them, refused to give the members of the General Assembly such a right.

This appears to us to be at least as important in its bearings as the Opinion of the Justices in 1883.

Of course, it may be argued with some ingenuity on the other side that "the reason why the people rejected the proposed amendment was because they considered the General Assembly already had the power to call a convention, or that they disliked the provision requiring a three-fifths approval of the action of such a convention"; but those are arguments a little too fine to have been likely to appeal to the ordinary body of the electors. The latter are not as a rule interested in refinements, but act in view of a general position or proposition which is readily understandable by people of normal intelligence; and when they voted by a majority to reject a constitutional amendment, empowering the Assembly to call a convention as a means to amending the Constitution, it is fair to conclude that they meant what they said, and that whatever might be the rule elsewhere they did not wish that mode of amendment to be open under our Constitution at least. There is the people's own reply to the question before

this Court. A reply which, we submit, has in substance the same effect as though the negative of this question were actually written into the Constitution itself. To that effect is *Bennett* vs. *Jackson*, 186 Ind. 533 (1917), where a majority of four out of five Judges gave great weight to the fact that the people had previously rejected a proposal to call a constitutional convention, and held that the legislature should not disregard that latest expression of the people, but that *such expression of the will of the people should be deemed as binding on the General Assembly as a positive provision of the Constitution.*

2. In 1898 and 1899 constitutional amendments to authorize the legislature to submit to the people the question whether conventions should be called were rejected. Subsequent historic factors.

The question as to whether the Rhode Island Assembly has a constitutional right *to submit to the people* the question whether a constitutional convention should be called is not before the Court at this time, since the precise question submitted is whether the legislature has power to "provide by law (a) for a convention to be called to revise or amend the Constitution of the State," *i. e.,* the question contemplates the possibility of the convention being provided for by law, passed by the General Assembly, and does not ask whether the Assembly can or should first take the instructions of the people.

We shall deal with this question a little more at length hereafter, but for the moment it is important only to observe that the General Assembly, having proposed and approved a form of entirely new and revised Constitutions, in the mode provided by Article XIII, twice submitted the same to the people (in 1898 and 1899), each of which carried an express provision that "At the general election to be held in the year 1906 and each twentieth year thereafter, the General Assem-

bly shall by law provide that the question, 'Shall there be a convention to revise the Constitution', be decided by the electors." And in both instances the people rejected the Constitution which contained this provision.

This is the last word to date of the people of Rhode Island to the members of the General Assembly as to whether the latter shall even have the right to submit to the people the question, "Shall there be a convention to revise the Constitution?" The people, when this question was so presented to them, refused to give the members of the General Assembly such a right.

In view of the foregoing, we submit that the Opinion of the Justices has been supported by the direct and definite vote of the people as to the meaning which they wish to be given to their fundamental law.

That Judge Durfee was correct in his statement that the existing mode of amendment is entirely practicable, appears clearly enough from the simple fact that under the provisions of Article XIII twenty-one amendments have been proposed and adopted, ranging over the period beginning November, 1854, and terminating with the last amendment on November 4, 1930 (absentee voting). In addition, a considerable number of other amendments have been proposed, in each case pursuant to the mode specified in the Constitution, and have been rejected, especially those above referred to in 1883, 1898 and 1899.

At the January session of 1924, His Honor the present Lieutenant Governor, introduced a resolution relative to calling and holding a constitutional convention, Section 1 of which was as follows:

> "Section 1. For the purpose of ascertaining the will of the people of the State with reference to the calling and holding of a Constitutional Convention, the Governor shall and is hereby directed to call by public proclamation a special election to be holden on the Second

Tuesday in August, A. D. 1924, to determine the following question:

"'Shall there be a Convention to revise, alter or amend the Constitution of the State?'

"Also to elect delegates to said Convention."

The resolution failed of passage, but it will be observed that even this resolution, introduced by one who will not be accused of being ultra-conservative, provided not for the calling of a constitutional convention by the Assembly, but for the submission to the people of the question as to whether or not such a convention should be called.

So that we revert to our previous statement that for ninety-two years—the entire period following the adoption of our Constitution—it has always been generally accepted that the Assembly has no constitutional power to call a constitutional convention, and furthermore that, so far as we are able to ascertain, not once has a resolution even been introduced into the General Assembly providing for the calling by it of such a convention.

True, there is evidence that it has been considered on two occasions that the General Assembly had power to submit to the people the question *whether* such a convention should be called, but even this subordinate power was denied by our Supreme Court in 1883. and notwithstanding the activity and agitation of such sterling Democrats as the late Charles E. Gorman, Augustus S. Miller, David S. Baker, Hugh J. Carroll, James H. Higgins, John J. Fitzgerald, Lucius C. Garvin, and many others, it appears to have been accepted, until the Lieutenant Governor's action in 1924, that if the Constitution was to be amended it must be by compliance with Article XIII and not even by submitting to the people the question whether such a convention should be called.

There is, therefore, a sharp distinction between the period before and after the adoption of the present instrument.

Prior thereto, frequent agitation and several conventions resulting in adoption. Subsequent thereto, although at periods much discussion, no conventions, no call for a convention, and a distinct opinion by an able Supreme Court that none could be called, a position acquiesced in for over fifty years—and all fortified by an express and distinct rejection by the people of a proposal to put into their Constitution an amendment which would give the General Assembly the power here in question.

Surely, from the point of view of history, the matter should no longer be considered open. There ought to be some point at which matters of this kind may fairly be considered determined. If, contrary to our contention, this Court should answer these questions "Yes", let there be no mistake—the matter would not be settled, and could not be, in that way. If this Court, in an advisory opinion, can properly disregard a similar opinion fifty years ago, it furnishes a cogent and additional reason why another Court, ten, twenty-five or fifty years hence may consider the matter still open and again decide in accordance with the original holding, leading to further confusion upon one of the fundamental principles of our government. But it may be answered that if the answer is "Yes" a constitutional convention may be held and a new Constitution adopted which will specifically cover the matter and set it at rest. We submit that this cannot by any means be taken as certain. There is certainly substantial doubt, if a convention should be held and a Constitution framed, whether it would be approved. Based on our history in 1898 and 1899, there is much reason to anticipate rejection, in which event the matter would be and remain wide open. On the other hand, if the Court should agree with the views herein expressed, and should answer the question in the negative, that point of constitutional law at least would be settled for all time, leaving it open, as before, for the submission

to the people in the constitutional mode under Article XIII as to whether the General Assembly should be authorized to provide for the calling of conventions, or, to provide in the alternative, for submission to the people of the question whether such a convention should from time to time be held.

True, a period of time (approximately two years) must elapse before adoption or rejection, but that is a short time in the history of a State, and will be more than compensated by certainty as to the meaning of our supreme law.

D. Consideration of *Opinion of the Justices,* 6 Cush. (Mass.) 573

And while we are on that point, it may not be amiss to dispose of one argument often advanced in support of the opposing view—it is said that the constitutional mode (Article XIII) should not be exclusive, as the convention mode should be open in case of great crisis or emergency where hasty action may be vital to the Republic. We leave those cases on one side, as was done by the Supreme Court of Massachusetts, *Opinion of the Justices,* 6 Cush. 573. That case carries an intimation that in the event of a real crisis, means would be found to meet it even though that means were in theory revolutionary. In the present instance, however, we have no such circumstance. Something in the nature of a crisis there is, but it is economic and not political, and so far as we are aware, no one claims that any contemplated changes in the Constitution can do more to improve that condition than can be or is being done under the present form of our government. We are threatened by no alien foe, and the only crises which are referred to by opponents in previous pronouncements are the alleged need of changes in the franchise, of the apportionment of the Senate, the redistricting of the State, the tenure or constitution of the judiciary, and similar matters. If the existence of "crises" of this

nature is determinative, then we have been in a crisis since 1783, which leads to the question "How long can a crisis continue without resolving itself into a normal state of affairs?"

The Rhode Island Court considers the Massachusetts case analogous. Let us examine it a little more closely. From it it appears (page 574) that if the people were considered to have a natural right in emergencies or upon the obvious failure of the existing Constitution to accomplish its objects, to provide for amendment or alteration, that view,

> "would involve the general question of natural rights and the inherent and fundamental principles upon which civil society is founded, *rather than any question upon the nature, construction or operation of the existing Constitution of the Commonwealth and the laws made under it.*"

That is precisely the view of our Supreme Court, to which we fully subscribe. To us it means this: That if we are going upon theories of natural right or rights alleged to be reserved, those by definition are *not* constitutional rights, that therefore such rights, if they exist at all, are rights of revolution and not of constitutional procedure.

The Massachusetts Court continues, stating its presumption "That the opinion requested applies to the existing Constitution and laws of the Commonwealth and the rights and powers derived from and under them." So here. This Court is asked with respect to "What would be a *valid* exercise of the legislative power." As it is conceded that the Assembly has no rights except under the Constitution, then the exercise of its powers must be pursuant to that instrument and not upon some theory of inherent right apart from the Constitution. And we may as well say here, with Judge Durfee in his monograph, that since under Article IV, Section 1, "This Constitution shall be the supreme law of the State," we absolutely deny the existence of any law, whether it be called

reserved power, natural right, or "common law right," over and above the Constitution. If there is another law superior to it, then the Constitution is not the supreme law of the State. The two ideas are mutually exclusive. As Judge Durfee said,

> "If there be any such law, for there is no record of it or of any legislation or custom in this State recognizing it, then it is, in our opinion, rather a law, if law it can be called, of revolutionary than of constitutional change."

The Massachusetts Court thereupon determines that

> "Under and pursuant to the existing Constitution, there is no authority given by any reasonable construction or necessary implication by which any specific and particular amendment or amendments of the Constitution can be made in any other manner than that prescribed in the Ninth Article of the amendments adopted in 1820. Considering that previous to 1820 no mode was provided by the Constitution for its own amendment, that no other power for that purpose than in the mode alluded to is anywhere given in the Constitution, by implication or otherwise, and that the mode thereby provided appears manifestly to have been carefully considered, and the power of altering the Constitution thereby conferred to have been cautiously restrained and guarded, we think a strong implication arises against the existence of any other power *under the Constitution* for the same purposes." (Italics ours.)

The Court then declines to decide what would be the effect of a purported law, *submitting to the people the question* of calling a convention and as to what would be the power of such convention if called. The effect of its statement upon this subject is that, without committing itself to the legality or constitutionality of such a convention, nevertheless if, in fact, called, its powers would in any event be restricted in such manner as the General Assembly should have directed in calling it.

It is freely admitted that the case does not go *quite* to the point of the Rhode Island case, but nobody can read it fairly without believing that the Court disapproved of the convention method where the Constitution was silent thereon and where another express mode of amendment was provided; and that the convention method was not one which could be justified under the provisions of the Constitution. But if that is so, it is not constitutional. To our minds it is therefore *un*constitutional.

Let us examine in another aspect into the alleged distinction between the Massachusetts and the Rhode Island cases. The opposing contention appears to assume that the Massachusetts case was right, as the Court was dealing with "particular amendments," but that the Rhode Island Court was wrong because it was dealing with a "revision." In other words, it appears to be conceded that if the Constitution is to be "amended," the method prescribed by the Constitution must be followed, but that if it is to be "revised" either the legislative method or the convention method is available.

1. Impossibility of distinguishing legally between "Amendment" and "Revision".

This view necessarily requires an exact definition of and distinction between "amendment" and "revision." We do not wish to be too legalistic, as we realize that the question before the Court is essentially a broad one; but after all, while we are dealing in essence with ideas, ideas can here be expressed only in words; and to learn what ideas are behind the words we must resort to the meanings (ideas) which those words customarily and properly bear and express.

Both "amend" and "revise" undoubtedly fall within the scope of the generic word "change"; and the opposition must therefore clearly indicate when a change which begins as an amendment becomes so sweeping that it is no longer an

amendment, but is a revision; and must also demonstrate that "amendment" is not broad enough to include "revision."

We therefore inquire: Is a change restricted to a modification of the article providing for the qualification of electors an amendment only? Apparently in the ordinary use of language it would be. Suppose it is coupled with an amendment providing that the tenure of the Justices of the Supreme Court shall be for life or during good behavior. Are we still dealing with amendments? Suppose there is a change solely in the provision for the representation of towns and cities in the Senate, and nothing else. That would apparently be an amendment. If it is coupled with the two modifications previously mentioned, have we a revision?

It is no answer to assert, as do the Twenty-Six Lawyers, that this is a political question to be determined by the legislature, and nothing with which the Courts have to do. We are dealing here with rights of a most sovereign and high character—the constitutional rights of the people—and the legislature has no power to infringe those rights nor indirectly to destroy them by making its own incorrect definition of the meaning of words, and then escaping responsibility on the ground that its action is political and not subject to review. The Supreme Court, the final guardian and arbiter of constitutional rights, must assume the burden of determining (if the theory of distinction between "amendment" and "revision" now considered be sound) at what point the legislative method is no longer required and a convention can properly commence to function.

This difficulty was clearly in the minds of the Judges in 1883. Their opinion disposed of the question by holding that since, under the Federal Constitution, a Republican form of Government was guaranteed, and since the great principles established by the Bill of Rights and the separation of powers into three departments must unquestionably form a part

of any new, as well as of the old, constitution, such changes as might be considered proper would all necessarily fall into the class of amendments; and that for this reason, among others, the legislative method prescribed by the Constitution was the only one which could constitutionally be followed in altering the fundamental law.

The Court was right. The words "amend" and "revise" are not words of art or science. They are not susceptible of such close definition that it is possible to determine with legal accuracy where one leaves off and the other begins. It is the old Greek philosophical problem of the "heap." They used to pour out a few particles of sand and ask whether there was yet a heap. If the answer was "No" they would add grains until someone said "Heap," whereupon they would take away one grain of sand, and ask why it had *ceased* to be a heap. So here. Particular amendments can be added until someone says "Now you are making a revision," and you can remove one amendment and ask why it has ceased to be a revision and is only a group of amendments.

In Bouvier's Law Dictionary we find "AMENDMENT. *In legislation.* An alteration or change of something proposed in a bill or established as law." Bouvier does not define either "revision" or "revise."

Century Dictionary, among other definitions, defines "amend" as follows:

> "To make a change or changes in the form of, as a bill or motion, or a constitution; properly, to improve in expression or detail, but, by usage, to alter, either in construction, purport or principle."
>
> "AMENDMENT. 3. *In deliberative assemblies.* An alteration proposed to be made in the draft of a bill or in the terms of a motion under discussion. Any such alteration is termed an amendment, even when its effect is entirely to reverse the sense of the original bill or motion.

"4. An alteration of a legislative or deliberative act or in a constitution; a change made in a law either by way of correction or addition."

Ibid. "REVISE. 1. To look carefully over with a view to correction. . . .

"2. *To amend;* bring into conformity with present needs and circumstances; reform, especially by public or official action." (Italics ours.)

Ibid. "REVISION. 1. The act of revision; re-examination and correction; as the *revision* of statistics; the *revision* of a book, of a creed, etc."

It will be noted that there is no possibility of clear distinction between the terms, that "amendment" carries the generic meaning of change or alteration, and that *one of the definitions of "revise" is "amend."*

The constitutional rights of the people ought not to be dependent upon such elusive shades of meaning, with respect to which the best minds may honestly be in grave doubt. The law, especially the fundamental law, ought not to be involved in a great mystery—it should be simple, plain and straightforward, with rights and duties fully and plainly set forth.

The opposite view results in a conclusion which is at least surprising, not to say absurd. It is insisted upon the other side (1) that the people have a perpetual and inalienable right at any time to make or remake their Constitution without regard to previous constitutional limitations. (2) It is conceded, however, that with respect to "amendments" the constitutional method must be followed, i. e., approved by two legislatures and ratification by a three-fifths vote of the people. *Opinion of the Justices,* 6 Cush. (Mass.) 573.

But, by hypothesis, "amendments" are considered less sweeping and of relatively less consequence than "revisions." It may therefore be asked, why have the people power to do the most important thing, but have no power to do the less

important thing? On all principles of logic it would be supposed that the greater includes the less; but not so under the theory now being considered. The people must follow the legislative mode, involving the expiration of two years before they can make a minor amendment to their Constitution, but, it is insisted by our opponents, can sweep away in its entirety the old constitutional fabric within a few weeks.

The whole difficulty, in this respect, arises from the assumption that a precise and scientific distinction can be made between terms which in themselves are not precise or scientific, and the consequent effort to make the most fundamental rights of sovereignty turn upon the distinction thus attempted to be made. The conclusions to be drawn under that theory must always be confused and vague because the factors involved in the problem are themselves indeterminate. It was doubtless for this very sound reason that the makers of our present system specified one distinct and practicable method by which amendments were to be proposed and adopted or rejected, a method nicely calculated to allow ample time and careful deliberation before fundamental rights were affected, and to make certain that the result attained represented the permanent views of the electorate and not those of a possibly transient majority. As the Court well said:

> "The object was not to hamper or baffle the popular will, but to insure its full expression. Our ancestors knew what we all know, that in spite of all precaution a majority may be worked up for an occasion which is not the true and permanent majority. They also knew, what we all know, that many electors, perfectly satisfied with the existing state of things, stay away from the polls on Election Day from mere inertness of temperament. It is inconceivable to us that they would have elaborated so guarded a mode of amendment, unless they had intended to have it exclusive and controlling."

And certainly, where a clear, distinct, practicable, and elaborate method of amendment is plainly set forth in the instrument itself, it is nothing but common sense to conclude that that method, and that method only, was the one intended to be adopted if changes, whether of "amendment" or of "revision," were to be undertaken. Insofar as a distinction may be taken between the two expressions, then certainly deliberation, debate, reflection, and calm consideration are more important where changes are to be sweeping than where they are in matters of form or detail.

E. Analysis of Opposing Views

1. Answer to the Brief of the Twenty-six Lawyers.

As above stated, some ten years ago a memorandum in the form of a brief was prepared and signed by twenty-six prominent attorneys, all leaders in the Democratic Party, entitled "A Constitutional Convention in Rhode Island," strongly criticising the opinion of the Rhode Island Court in 1883, and upholding the convention method of amendment. Among its signers were the present Governor, Hon. William W. Moss, now a member of this Court, and Hon. Patrick H. Quinn and Hon. Thomas F. Cooney, of counsel in this case. As that brief appears to have been carefully prepared, it will be proper to examine the points advanced therein.

(i) Section 1, Article I, is to be construed in connection with Article XIII.

By far the greatest emphasis is laid upon the proper interpretation of the first part of Section 1 of Article I, in which is stated "The right of the people to make and alter their constitutions of government," but considerably less attention is paid to the balance of this Section, which provides, "but that the Constitution which at any time exists, till changed by an explicit and authentic act of the whole people,

is sacredly obligatory upon all." The brief argues that this Section enunciates a "fundamental principle . . . namely that the people of the several States of the American Union retain sovereign power," subject only to the provisions of the Federal Constitution. That principle has often been stated; but the retention of sovereign power is quite consistent in the formation of the social compact with a binding statement of the terms upon which that power is to be exercised.

(ii) Nature of Constitution and authorities thereon.

What is a Constitution? It is the fundamental law of government, and government is a compact between the whole people and each individual; and between each individual and the whole people, and whereby the whole people agree to protect the rights of the individual and the individual agrees to give to the government of the whole people the measure of support which they may require within the limitations of the Constitution. And each individual who remains or comes under the operation of the Constitution is conclusively presumed to have assented to the terms of this compact. Therefore, neither party to this governmental compact is at liberty to break the contract without the assent of the other. (The foregoing and succeeding definitions and quotations are, in substance, taken from Mr. Sheffield's monograph.)

Rousseau says that

> "The social compact can be formed only by unanimous consent, because the rule itself that a majority of votes shall prevail can only be established by agreement, that is by compact."

Henry Clay, speaking of Rhode Island affairs in 1842,said,

> "How is this right of the people to abolish an existing government and to set up a new one to be practically exercised? Who are the people that are to tear up the whole fabric of human society whenever and as often as caprice or passion may prompt them? When all the arrangements and ordinances of existing and organized

> society are prostrated and subverted . . . all the offspring of positive institutions are cast down and abolished and society is thrown into one heterogeneous and unregulated mass. . . . As often and wherever society can be drummed up and thrown into such a shapeless mass, the major part of it may establish another, and another new government in endless success. Why, this would overturn all social organizations, make revolution—the extreme and last resort of an oppressed people—the commonest occurrence of human life and the standing order of the day."

John C. Calhoun said that only in civil society are majorities and minorities known to have any rights. Those rights are political and derived from agreement or a compact. How absurd it is then to suppose that the right of a majority to alter or abolish the Constitution is a natural right. The right of altering or changing a Constitution is a conventional right belonging to the body politic and subject to be regulated by it.

Mr. Madison in the Federalist No. 43 says,

> "A faction is a majority or minority of the whole who are united and actuated by some common impulse of passion or interest, adverse to the rights of the other citizens or to the permanent and aggregate interest of the community."

And in Federalist No. 51 he said,

> "In a society under the forms of which the stronger factions unite and oppress the weaker, anarchy may as truly be said to exist as in a state of nature."

And, by Chancellor Kent,

> "The Constitution is the act of the people speaking in their original character and defining the permanent conditions of the social alliance."

In 1790, Madison wrote to Jefferson as follows:

> "On what principle is it that the voice of the majority binds the minority? It does not result, I conceive,

from a law of nature but from a compact founded on utility. *A greater proportion might be required by the fundamental constitution of society,* if under any particular circumstances it were judged eligible. Prior, therefore, to the establishment of this principle, unanimity was necessary, and rigid theory accordingly presupposes the assent of every individual to the rule which subjects the minority to the will of the majority."

Curtis, in his History of the Federal Constitution, says (Volume 2, Page 474),

"The existence and operation of a prescribed method of changing particular features of a government mark the line between amendment and revolution, and render a resort to the latter, for the purpose of melioration or reform save in extreme cases of oppression unnecessary. According to our American theory of government, revolution and amendment both rest upon the doctrine that the people are the source of political power, and each of them is the exercise of an ultimate right. But this right is exercised in the process of amendment in a prescribed form which preserves the continuity of the existing government, and changes only such of its fundamental rules as require revision without the destruction of any public or private rights that may have become vested under the former rule. Revolution, on the contrary, proceeds without form, is the violent disruption of the obligations resting on the authority of the former government, and terminates its existence often without saving any of the rights which may have grown up under it. . . . Without an ascertained and limited proceeding (in amending the Constitution) all change becomes in effect revolutionary. . . ."

And Cooley, "Constitutional Limitations", says (page 30) that "the people" is the body of electors created under the Constitution, and even they can amend the Constitution only by legitimate modes, which must either be prescribed in the Constitution, or, *in the absence of a prescribed mode,* by authority of a law making power.

In his History of Michigan, page 345, he says that,

> "The written instrument comes into existence with the understanding and purpose that its several paragraphs and provisions shall mean forever exactly what they mean when adopted; and if a change is to take place in the Constitution it must be brought about by the steps which in the instrument itself are provided for."

The Iowa Court in *Koehler & Lange* vs. *Hill,* 60 Ia. 543, said that,

> "It matters not if not only every elector, but every adult person in the State should desire and vote for an amendment to the Constitution, it cannot be recognized as valid unless such vote was held in pursuance of, and in substantial accord with the requirements of the Constitution."

(iii) The people can and often do voluntarily place limitations upon the exercise of their sovereign power.

This principle is worthy of a little more consideration since it is believed that at this point the opposing view is derived from assumptions which are in truth unfounded. Our adversaries iterate and reiterate that it is the people—the people—who are to rule and that if a majority of them (apparently meaning the electors) manifest a desire for change in the fundamental law, the change at once becomes rightful and constitutional. Perhaps the authorities above mentioned sufficiently meet this position, but let us approach it for a moment on principle.

Mr. Sheffield gives the illuminating example of twelve castaways upon a desert island, starting in a state of nature and without law. Have seven of them a natural right to impose their will upon the remaining five? Can they lawfully and rightfully enact that all the work of the community shall be done by the five, and would there be any-

thing unlawful in the minority withdrawing to another part of the island to live as they chose? The answer is obvious. In such circumstances the majority has no *legal* rights. If they govern, it is either by force or because the five agree or acquiesce. But if the twelve agree then you have an organized society ruled by law, which cannot be lawfully changed without the assent of the minority and according to the rules laid down. True, the majority rules, but it rules in accordance with limitations, voluntarily submitted to by the majority, for the benefit of all; and *legal* change cannot thereafter be made except in accordance with the compact.

The remarks of Daniel Webster in the case of *Luther* vs. *Borden,* 7 How. 1 (1849) are often quoted by the proponents of the other view. As Judge Durfee in his monograph points out, however, (page 52) Mr. Webster in that case was an advocate whose purpose was to show that it had been the practice of the people of the several States to pass a statute leading to a constitutional change before making it, *i. e.,* he was endeavoring to discredit the Dorr movement, and was using the State of New York as the most recent example, being one where a constitutional convention had been called pursuant to an act of the legislature. He was not considering whether that statute was constitutional. In his works, however, he spoke more closely to the point. Judge Durfee quotes him as follows:

> "It is one principle of the American system that the people limit their governments, national and state. They do so; but it is another principle, equally true and certain, and, according to my judgment of things, equally important, that the people often limit themselves. They set bounds to their own power. They have chosen to secure the institutions which they establish against the sudden impulses of mere majorities. All our institutions teem with instances of this. It was their

> great conservative principle, in constituting forms of government, that they should secure what they had established against hasty changes by simple majorities."

So, under the Federal Constitution, it requires the application of legislatures of two-thirds of the States to call a convention, and amendments proposed in any mode must be ratified by legislatures or conventions of three-fourths of the States.

> "The fifth article of the constitution, if it was made a topic for those who framed 'the people's convention' of Rhode Island, could only have been a matter of reproach. It gives no countenance to any of these proceedings or to anything like them. On the contrary, it is one remarkable instance of the enactment and application of that great American principle, that the constitution of government should be cautiously and prudently interfered with, and that changes should not ordinarily be begun and carried through by bare majorities."

A perfect example of the voluntary limitation of the power of majorities is found in the United States Constitution itself. Under it the States granted constitutional powers to the Federal Government, effective when adopted by nine States. Under that Constitution, however, changes may be made and sovereignty resumed by the States, not by the act of a majority, but by the act of three-fourths of the States which have thus joined together, acting either through conventions or through the legislatures. The exercise of the ultimate sovereignty of the United States is vested, therefore, not in the majority of the people or a majority of the States, but absolutely and solely in three-fourths of the States. How, then, can it be said that a mere majority necessarily have the reserved right to change the Constitution at any moment?

It seems clear that one of the primary purposes of a Constitution is to preserve the rights of the minority against the majority until changes are made in the mode provided by the compact itself. Of what use is a Constitution to a minority if it can be changed at any time at the whim of a bare majority? If so, as Mr. Clay points out, it is subject to frequent and capricious change, always leading to the possibility of the destruction of all the rights which have grown up under it. If changed otherwise we are driven to the conclusion that it is a revolutionary and not a constitutional alteration. And Section 1 itself solemnly enacts that "the Constitution which at any time exists, till changed by an explicit and authentic act *of the whole people,* is sacredly obligatory upon all." What is an explicit and authentic act of the whole people? It is submitted that to be constitutionally explicit it must be constitutionally expressed; and that to be authentic it must both be legal and be duly and legally authenticated or evidenced. But in our Constitution, the mode by which it is to be made explicit and authentic is expressed in only one place and in only one mode, and that is in accordance with Article XIII.

(iv) Section 10 of Article IV of the Constitution is subject to the implied prohibition of Article XIII.

It is further claimed upon the other side that since Section 10 of Article IV continues in the General Assembly "the powers they have heretofore exercised," and since, prior to 1842, the legislature called several conventions, that power is preserved to it by the Constitution. This claim, however, turns out to be a mere restatement of the original question; for the same Section 10 preserves the powers of the Assembly, by its terms, subject to an express limitation, i. e., "unless prohibited in this Constitution"; and, as already demonstrated, and as so ably set forth by Judge Dur-

fee and Mr. Sheffield, the power to call a convention is, in fact, necessarily, though impliedly, prohibited by considering Article XIII in connection with Article I, Section 1. That such prohibition exists would appear established by the unbroken usage of ninety-two years and by the invariable adoption of the method of amendment prescribed in Article XIII.

This matter of implied prohibition is one which our opponents do not concede. In the brief of the Twenty-Six Lawyers above mentioned, the ground is repeatedly taken that while the grant of an ordinary power may and usually does imply the denial of any other power, as, for example, in a deed, mortgage or will, such implication is not to be made in construing the provisions of a Constitution, because that is formulated by the sovereign power, against which no implications are to be made. That the grant of a constitutional power may imply the denial of another clearly appears, however, from a consideration of several instances. The precise point has been before our Supreme Court, among others, *In re Opinion of the Supreme Court* upon the Act passed by the General Assembly at its January Session, 1854, Reversing and Annulling the Judgment against Thomas W. Dorr, 3 R. I. 299, and also in *Taylor* vs. *Place,* 4 R. I. 324.

The *Dorr* case dealt with an Act of the Assembly purporting to annul the judgment of the Supreme Court for treason rendered against Thomas W. Dorr. The Constitution, by Article III, provided "The powers of the government shall be distributed in three departments; the legislative, executive, and judicial." It will be noted that this is an affirmative delegation of power. From it, however, the Court *implied* a negative, holding that since the judicial power was separate from the legislative, the legislative did *not* have the judicial power assumed by it in the passage

of this Act, and declared the Act unconstitutional, with the words

> "The power exclusively conferred upon the one department is, *by necessary implication,* denied to the other. The Courts, therefore, cannot enact laws. Their power is to judge and determine, to declare what the law at any time is, not what it ought to be or shall be" (p. 301).

For the same reason the General Assembly cannot rightfully exercise the judicial power. That is conferred upon the Courts and necessarily prohibited to the General Assembly.

There, as here, it was claimed that judicial power continued in the Assembly under Section 10 of Article IV—inasmuch as judicial powers, prior to the Constitution, had customarily been exercised by the Assembly. It was held that the implied prohibition was, nevertheless, effective.

And in line with our argument above as to the authority and weight attaching to a construction long accepted, the Court in the *Dorr* case also had this to say:

> "If the practice of the General Assembly, down to the adoption of the Constitution, had been to exercise such a jurisdiction, and such practice has been discontinued since, it is fair to presume it was discontinued because inconsistent with that instrument." (3 R. I. at 308.)

Similarly here. Since the Assembly has not once since 1843 passed an Act to call a constitutional convention, although calling four of them prior to adoption of the Constitution, "it is fair to presume that it (the practice) was discontinued because inconsistent with that instrument."

As the Court, however, by *dictum,* recognized the propriety of a portion of the judicial functions of the Assembly, the matter came up again and was finally settled by the opinion of Chief Justice Ames in *Taylor* vs. *Place,* 4 R. I.

324. In a lengthy and profound opinion he flatly held that from and after the adoption of the Constitution *all* judicial powers were *by implication* prohibited to the General Assembly, saying that the provisions of Section 10 of Article IV that "The General Assembly shall continue to exercise the powers they have heretofore exercised unless prohibited in this Constitution" did not justify the exercise of judicial powers, since those are expressly vested by the Constitution in the Supreme and inferior Courts; which, by necessary implication, prevents their exercise by the legislative department. He further holds that the expressed distribution of powers is "for the purpose of preventing each department from exercising those appropriate to the others." At page 361 he emphasizes

> "That in matters of doubtful interpretation, the long continued practice of the other departments of the government, acquiesced in by the people, under such an instrument, is often properly resorted to by the Courts, for the purpose of ascertaining its meaning; and even the authentic debates of the body which framed the Constitution have, though with caution, been used in such matters for the same purpose."

In that connection at this point it is perhaps proper to refer to the fact that an amendment was actually proposed in the convention which adopted our Constitution by Mr. Ennis to Section 1 of Article I, *which was rejected.* That amendment would have made the first Section substantially identical with that of Pennsylvania, the *dicta* of two opinions from which have been much relied upon in opposition to our contention. Mr. Ennis's rejected amendment to Section 1 read as follows:

> "Section First. All political power and sovereignty are originally vested in and of right belong to the people. All free governments are founded in their authority and are established for the greatest good of the whole

number. The people have, therefore, an inalienable and indefeasible right in their original sovereignty and unlimited capacity to alter, reform or totally change the same whenever their safety or happiness requires." See journal of the Constitutional Convention of 1842 in the State archives under date of September 13, 1842.

But it is said on the other side that there is a distinction between an implication against another branch of the government, such as the General Assembly, and an implication against the sovereign; and that while the first may be proper (*Taylor* vs. *Place*), the second is out of order, i. e. that no implication by affirmative words can arise against the sovereign, i. e. the State or people.

That the asserted distinction is unsupportable both in theory and in practice is ably pointed out by Judge Durfee in his monograph. By hypothesis, and as established in *Taylor* vs. *Place* (*supra*), an implication *can* arise against a department of the government, e. g. the legislative, which is not the sovereign but a creature and delegate of the sovereign. And whether or not an implication can arise against the sovereign is logically not here material, for it is the General Assembly which is contemplated as the body assuming to call a constitutional convention, and not the people; so that the doctrine of implied prohibition still applies with full force against action by the legislative department in taking steps to alter the Constitution, which created it, otherwise than in the constitutional mode prescribed.

And that implied prohibitions can be, and have been made against the sovereign is demonstrated, among other instances, in connection with the unlawful and unconstitutional secession of the Southern States in 1861. By the Constitution, they had conferred definite and limited powers upon the United States, and had expressly declared that all powers not so conferred or enumerated were reserved to the

respective states or to the people. It was *not* stated that the sovereign states could not secede. Everyone knows the answer. The Civil War decided the question, and the Supreme and State Courts have repeatedly adjudicated that secession was unconstitutional, and that a necessary implication arose from the power granted to the Federal Government that that power should not, without the consent of the United States, be revested in the respective sovereign states. That would appear to dispose once and for all of the theory that implications against the sovereign cannot be derived from an affirmatively granted power.

In the brief of the Twenty-Six Lawyers, a good deal is made of the point that in two cases decided after the rendition of the Opinion of the Justices in 1883, our Court found it proper to distinguish between the principles then applied and those which were effective in the cases in question. The argument is somewhat labored and need not be taken up in detail. What we desire to emphasize, however, in each of them is this: Each was an adjudicated case involving a judicial decision, and in each the Court referred with approval to its Opinion as rendered to the Senate in 1883.

> *State* vs. *Kane,* 15 R. I. 395 (1886);
> *Higgins* vs. *Tax Assessors of Pawtucket,* 27 R. I. 401 (1905).

It does not appear to us of great moment or to be a ground of adversary criticism that the Court distinguished those cases from the Opinion. Surely an earlier opinion can be distinguished from a later one without impairing its value as a precedent. It is done every day. The real fact which is important, and which cannot be escaped, is that in two adjudicated cases the views expressed in the opinion *Re Convention* in 14 R. I. have been expressly approved and reaffirmed.

In that brief or memorandum of the Twenty-Six Lawyers are repeated the arguments made originally by Judge Bradley and Abraham Payne in their pamphlets published in 1885 ("The Methods of Changing the Constitution of the States, especially that of Rhode Island") that in a substantial number of States whose Constitutions, generally speaking have provisions for amendment in the legislative mode but are silent with respect to amending through constitutional conventions, conventions have nevertheless been called, and have submitted to the people new or revised Constitutions which have been adopted. The same point is emphasized by certain text writers who deal with this matter, e. g. Jameson on *Constitutional Conventions,* 4th Ed. Sections 573, 574, where he criticizes the opinion of the Rhode Island Court. See also Hoar *"Constitutional Conventions, Their Nature, Powers and Limitations."* pages 46-66.

The fact is freely conceded: the legal inferences remain unchanged. While the instances mentioned are precedents as respects what has been done politically, they are without weight as judicial authorities, and ought not to affect the opinion of a judicial tribunal which is asked what can *lawfully* be done. All of such changes, in our opinion, were in their nature revolutionary and *extra*-legal, that is to say unconstitutional. Of course, if a political act of that type takes place, if the people by a majority purport to adopt a new Constitution so submitted, if a system of government is organized thereunder, and Courts are established or continued in pursuance of its provisions, it is idle, short of a resort to arms, to contend that the new government is without force in law or under the Constitution. No court can properly attack the government or Constitution of which it is the creature, and such attacks are therefore not made.

This principle is illustrated by *Taylor* vs. *Commonwealth,* 101 Va. 829 (1903). A constitutional convention was called

by a direct vote of the people and itself framed and adopted a Constitution without submitting it to the people for ratification. The government was organized and acted upon under the new Constitution, which was proclaimed by the Governor as directed therein. It was recognized by the General Assembly, and the judiciary took oath thereunder. The Court found that it had been acquiesced in by the people by peacefully accepting it and registering as voters thereunder. Under it the defendant was found guilty of felony without trial by jury, and he challenged the constitutionality of the new instrument. The Court held that as a matter of fact the new Constitution was in force throughout the State

> "and there being no government in existence under the previous Constitution, opposing or denying its validity, we have no difficulty in holding that the Constitution in question . . . is the only rightful, valid and existing Constitution of this State."

The Court did not pass upon the question as to whether the convention was without power to promulgate the Constitution, for which it gave two reasons. (1) Because there was no library available in which it could investigate the question. (2) That even if the convention was without legal power it would not change the result of this case, *i. e.,* the Court being itself the creature of the new "Constitution" felt that it could not question the validity of the instrument under which it itself was acting. The case has weight only as recognizing a political as distinguished from a constitutional or legal principle.

See to the same effect *Loomis* vs. *Jackson*, 6 W. Va. 613, 708. There are a number of other cases which express the same view.

But, again as Judge Durfee said in his monograph, while such instances are pertinent he does not value them as

precedents because (1) we are not told how often such changes have been rejected, when proposed, because unconstitutional; (2) the Constitutions of the several States have their differences as well as their resemblances, and what is wrong under one may be right under another; (3) the special provision, Article XIII, which is so clearly mandatory in our Constitution may be less clearly so in another, or it may be accompanied by some other clause which countervails its restrictive effect; (4) if the declaratory clause, which was offered and rejected in the convention which framed our Constitution (see *supra*, p. 42, Ennis amendment) had been adopted, we might find it more difficult to maintain that the special provision (Article XIII) is exclusive and controlling; and (5) as to certain cases which are substantially similar to ours on the political side, Judge Durfee has this to say:

> "That the legislature of no other state can decide for the people of Rhode Island what is the meaning of their Constitution, or absolve them from their duty to support and obey it according to the meaning which it has in Rhode Island. A legislative precedent is not like a judicial precedent, for legislatures give no reasons for their decisions, and we cannot know what arguments or influences may have prevailed with them. . . . A legislature is not generally well fitted to decide legal or constitutional questions."

F. No Judicial Decision Has Been Found Contrary to Our Position

We are in no wise disturbed because certain text-writers have shown an inclination to criticise the Opinion of the Justices of 1883. Jameson, Dodd and Hoar rely for their position upon the fact that the Legislatures of a number of other states have assumed to call constitutional conventions where the constitutions of those states were silent as to the existence of such power, and where a legislative

mode of amendment was provided. That argument appears sufficiently met by the observations of Judge Durfee above alluded to. They are political and not judicial precedents. Dodd refers to only *three cases* in support of his position and himself describes those cases as *dicta* upon the point. THE REVISION AND AMENDMENT OF STATE CONSTITUTIONS, page 46.

And we may as well say here that notwithstanding the great extent of the discussion upon the subject and the very lengthy period of time during which that discussion has taken place, we find nowhere in the whole range of the discussion, and our own researches have not produced, a single judicial decision contrary to the opinion of the Justices, upon the question before us here. There are a number of *obiter dicta* not necessary to recorded decisions, and much is made of them by text-writers and proponents of the opposing view. It seems unfortunate, but inevitable, that courts—even the ablest—when presented with constitutional questions, have so often thought it necessary in their opinions to explore large areas in the constitutional field in no way involved with the precise questions at issue. That Judge Durfee and Judge Shaw in the Rhode Island and Massachusetts cases, respectively, were able to restrict themselves to profound, comprehensive, yet brief decisions of the points before them, is but another instance of their preeminent ability.

G. Even Were It Otherwise, Rhode Island Should Maintain Its Own Established Position

But even though certain text-writers hold with the political practice which has in the past obtained in a few of our sister states, we repeat that we are quite willing to be considered "peculiar" by those authorities. It is not the first time that Rhode Island has at the same time been both "dif-

ferent" and right—indeed, that is our chief claim to an enduring place in history.

The state was founded by a reformer who found himself at odds with the viewpoint of all of his neighbors in Massachusetts. It made him great. The state broke new ground in America in establishing its fundamental principle recognized in the Royal Charter that

> "no person within the said colony at any time hereafter shall be in any wise molested, punished, disquieted or called in question for any differences in opinion in matters of religion";

which also contained the declaration of the founders that it was much on their hearts

> "to hold forth a lively experiment that a most flourishing civil state may stand and best be maintained, and that among our English subjects, with a full liberty of religious concernments."

This was, for the time, peculiar—it has become our chief claim to fame and the admiration of posterity.

We were the first to declare our independence of Great Britain—the last to subscribe to the United States Constitution; the last, also, of the original colonies to adopt our own Constitution. More recently, when prohibition was the burning issue, we were one of the two states which, alone among the forty-eight, declined and continued to decline to ratify the Eighteenth Amendment to the Federal Constitution. Our judgment has been confirmed by its recent repeal. In the light of our history and experience, therefore, we need not be too much concerned that a few states have taken political action contrary to our own tradition, nor that certain (but not all—nor the greatest) individual text-writers feel that the political precedents thus established impugn the soundness of the views of our own Supreme Court and of most of our leading statesmen before and at that time.

H. Analysis of Authorities Cited *Contra*

We have said that our researches have produced no opposing judicial decisions. Let us look at the cases which have been, or may be, referred to on the other side. Dodd refers to *Wells* vs. *Bain* and *Wood's Appeal,* in Pennsylvania, and *Collier* vs. *Frierson,* in Alabama, all of which he concedes to be *dicta* only.

1. *Wells* vs. *Bain,* 75 Pa. St. 39 (1874).

In that case two points, and two points only, were before or decided by the Court: (1) As to whether, when the legislative act providing for the calling of the Constitutional Convention designated that the election to be held thereunder should be conducted by the regular statutory election officials, it was competent for the Convention to provide that, in the City of Philadelphia, the election should be conducted under the supervision of their own appointees. The Court's answer was "No." (2) The act calling the Convention provided that upon the request of one-third of the delegates, any proposed article should be voted upon separately by the people. There was some evidence that a request had been made to vote on the article relating to the judiciary department by one-third of the Convention. The Court held, however, that this was a procedural matter in the Convention and it might be presumed that it acted in accordance with its authority. It is true that in its opinion the Court announced that there were

> "three known recognized modes by which the whole people, the state, can give their consent to an alteration of an existing lawful frame of government, viz.:
>
> "1. The mode provided in the existing Constitution.
>
> "2. A law as the instrumental process of raising the body for revision and conveying to it the powers of the people.
>
> "3. A revolution."

It will be observed that the Court said, "recognized modes," not "constitutional modes." It could not have meant the latter because one of the modes mentioned was "revolution." It also emphasized the declaration of rights in the Pennsylvania Constitution, which is substantially broader than ours ("have at all times an inalienable and indefeasible right to alter, reform or abolish their government in such a manner as they may think proper"), which is in line with the *rejected* form submitted here by Mr. Ennis (*supra*, p. 42). And the Court further said that

> "the people here meant the whole—those who constitute the entire state, male and female citizens, infants and adults. A mere majority of those persons who are qualified as electors are not the people, though when authorized to do so they may represent the whole people."

None of the above argument, whether it be for or against the position we maintain, was, as we have demonstrated, anything more than *dictum*.

2. *Wood's Appeal*, 75 Pa. St. 59 (1874.)

This was a proceeding by certain citizens to enjoin State officials from holding a general election to pass upon a proposed Constitution prepared by a constitutional convention. In 1871 the legislature submitted to the people the question whether such a convention should be called, and the popular vote was affirmative. An act of 1872 provided for the election of delegates accordingly, with a proviso for submission to the people of any Constitution adopted by the convention. Petitioners argued that the act of 1871 was invalid and that therefore the convention was not a legal body. The Constitution provided a different method for its amendment along the lines of Article XIII of the Rhode Island Constitution, but included a Bill of Rights similar to that proposed here by Mr. Ennis and rejected by our convention in

1842. The Court held the act of 1871 valid and refused the injunction, stating that

> "The calling of a convention and regulating its action by law is not forbidden in the Constitution."

The lower Court, the decision of which was affirmed on appeal, relied upon the statement of Mr. Webster

> " 'That of the old thirteen States, their Constitutions, with one exception, contain no provision for an amendment, yet there is hardly one that has not altered its Constitution and it has been done by conventions called by the legislature as an ordinary exercise of power' ";

and further observes that

> "in view of the foregoing it would seem that the question as to whether the calling of a constitutional convention was a legal exercise of power by the legislature should now be considered by all judicial tribunals as settled so firmly as a part of the common law of our government that any attempt to disturb it at this day would savor more of revolution than legitimacy. He would be bold indeed who would now assert that all those conventions were usurpations and that all the Constitutions proposed by them and adopted by the people were revolutionary."

It will be observed that the foregoing was quite outside the scope of the actual decision. The question before the Court was not, as here, whether the legislature could call a convention, but whether it had acted lawfully in submitting to the people the question whether such a convention should be called—which is no part of the matter now before this Court. It is further to be observed that the Court cites only political precedents and not judicial ones. Still more important, that the instances of political action upon which it relies are those in which the Constitutions of the original States "contained no provision for their own amendment"—a situation readily distinguishable from that before the

Pennsylvania Court, or now before this Court. If boldness be required to assert that, in the absence of amendatory provision in a Constitution, the adoption of a new one by the conventional method is, in its essence and theory, revolutionary, we have the hardihood to make that exact assertion; and for it we have the support of Chief Justice Durfee and of many statesmen and authorities elsewhere referred to in this brief. It comes only to this,—the breach of a social compact contrary to its fair meaning is or is not outside the law. The compact being the supreme law of the land, its breach *is* outside the law and is therefore in its nature a change imposed by force and not by law, *i. e.,* revolutionary.

3. *Collier* vs. *Frierson,* 24 Ala. 100 (1854).

The sole question in this case was whether a constitutional amendment proposed in the mode specified in the Constitution for its own amendment had been properly adopted. The court held that it had not, because the proposed amendment was not properly ratified at the second session of the General Assembly; and therefore did not satisfy the constitutional requirements which were similar to our Article XIII.

The Court, however, by way of *dictum,* said that the Alabama Constitution could be amended either by the people who originally framed it or in the mode prescribed by the instrument itself, saying,

> "We entertain no doubt that to change the Constitution in any other mode than by convention, every requisite which is demanded by the instrument itself must be observed, and the omission of any one is fatal to the amendment."

The expressions quoted are obviously unnecessary to the decision and can have no weight against the Opinion of our Supreme Court.

We should refer also to two other cases which have been cited by the proponents of the other view. The first is,

(a) *State* vs. *Taylor*, 22 N. D. 362 (1911).

This case has special interest because it accords with our position as to the logical impossibility of distinguishing between "amendment" and "revision". A constitutional amendment was proposed and adopted, apparently in accordance with the method prescribed in the Constitution itself, but the Constitution carried a clause that additional public institutions in the State should not be established "without a *revision* of this Constitution". It was claimed by petitioners for an injunction that the provision for "amendment" did not authorize a "revision", and that therefore no revision had taken place, since "revision" is a change in the Constitution of such nature that it could be effected only by means of a convention. But it was held that "revision" in the amendatory provisions included "amendment," *i. e.*, that no general review or revision of the Constitution was necessary to make legal the action taken; and the Court added that the word "amendment" was used in the popular sense to embrace any form of change, alteration or revision of the Constitution. So far the case is favorable. It does, however, contain a *dictum* to the following effect:

> "It is also reasonably clear that the body of the delegates failed to understand, what seems to be the consensus of authorities at the present time, that the legislative assembly has the inherent power to submit the question of calling a constitutional convention to the electors."

These expressions were quite beside the point before the Court, and it is significant that the Court omitted to cite the "authorities" who constituted the "consensus" mentioned. Doubtless it had in mind, not the judicial, but the

political precedents so often relied upon by proponents of the contrary view.

The other is

(b) *State* vs. *Dahl*, 6. N. D. 81 (1896).

This case appears to hold that *mandamus* will lie to compel the Secretary of State to proceed in accordance with a joint resolution of the legislature recommending that at the next general election the people should vote on whether a constitutional convention should be held, although the conventional method of amendment was not expressly provided for in the existing Constitution. The Court says that it is "obvious" that the body which is vested with power to designate the question to be submitted to the people is the legislature. It is to be noted, however, that in the course of its opinion, the Court considerably weakens the force of its own position by holding that it is unnecessary for the Court to decide the matter, saying

> *"It is unnecessary for us to express any opinion on the question whether Section 202 of the Constitution, prescribing the mode of amending the same, prevents the lawful assembling of a constitutional convention in this State to revise the fundamental law.* The decided weight of authority and the more numerous precedents are arrayed on the side of the doctrine which supports the existence of this inherent legislative power to call a constitutional convention, notwithstanding the fact that the instrument itself points out how it may be amended. See Jameson CONSTITUTIONAL CONVENTIONS, Sections 570-574 D. But see *In Re Constitutional Convention,* 14 R. I. 649; *Opinion of Justices of Supreme Court,* 6 Cush. 573."

It will be observed that the point before the Court was, not the right of the Assembly to call a constitutional convention, but to submit to the people the question whether such a convention should be called; and that the expressions

quoted are merely *dicta*. It is also proper to point out that although the Court made the observation that the "decided weight of authority" was with it, its citations hardly bear it out. It cites in its favor *one text writer,* in opposition the Opinions of *two Supreme Courts*. It appears difficult to support the Court's statement relative to the "decided weight of authority."

The brief of the Twenty-Six Lawyers cited also two cases in Indiana as favoring their position. They appear to us to support the conclusion for which we stand.

Ellingham vs. *Dye*, 178 Ind. 336.

The Legislature itself prepared a series of amendments to the Constitution which it proposed to submit to popular vote. An injunction was sought against the officers designated to hold the election under the Act. The Court held the Act void, citing Cooley, *Constitutional Limitations*, 7th ed., 56, as follows:

> "'By the Constitution which they established they not only tie up the hands of our official agencies, but their own hands as well; and neither the officers of the state nor the whole people as an aggregate body, are at liberty to take action in opposition to the fundamental law.'"

It further held that the Legislature has only delegated power to pass laws in the nature of ordinary legislation under the Constitution, and that their legislation proposing amendments was not such ordinary legislation. As fas as the point actually decided is concerned, it appears strongly to support our own position, but as the opinion contained *dicta* to the effect that the Legislature had the right to call a Convention, or at least to submit the question of calling such a Convention to the people, it is cited in the brief of the Twenty-Six Lawyers as supporting their argument.

In the same brief another recent Indiana case is cited

which is even more strongly in favor of our position. That case is

Bennett vs. *Jackson*, 186 Ind. 533 (1917).

There the Constitution neither granted, nor in terms forbade, the Legislature to call a Constitutional Convention. In 1913 the Assembly submitted to the electors the question whether a Constitutional Convention should be called, which was voted down by the people by a majority of more than one hundred and three thousand. There had been no subsequent poll upon the question. Thereafter, the Legislature passed an Act "to provide for the election of delegates to a convention to revise the Constitution of the State," and this case was a petition against state officials to declare the Act void and to enjoin proceedings thereunder. The Court held, by a majority of four to one, that the Act which was challenged violated that part of the Bill of Rights which gave to the people an indefeasible right to alter and reform their government, particularly since the proposal for a convention had previously been definitely rejected by the people; that since it was conceded that the people had a right to create a new Constitution, the only question was one of method; that since the Legislature had no inherent rights, it must justify its right to take the initiative in calling a convention by a warrant for the same either in the Constitution or directly from the people, saying:

> "It seems to be an almost universal custom in all of the states of the Union where the Constitution itself does not provide for the calling of the Constitutional Convention, to ascertain, first, the will of the people and to procure from them a commission to call such a convention before the Legislature proceeds to do so. The people being the repository of the right to alter or reform its government, its will and wishes must be consulted before the Legislature can proceed to call a convention," citing, 6 R. C. L., Section 17, page 27; *Hoar*, CONSTITUTIONAL CONVENTIONS, page 68 (1917).

Great weight was attached to the people's previous rejection of a proposal to call such a convention, and it was said that *this expression of the will of the people was deemed by the court to be as binding on the General Assembly as a positive provision of the Constitution.*

The dissenting opinion relies upon its interpretation of Cooley, Dodd, Jameson and Hoar, but recognizes the rule that

> "when the Constitution provides that a power shall be exercised in a particular manner, a failure to comply with the provisions of the Constitution in any material respect will vitiate the Act, and the courts have power to so declare, . . . *if the framers of the Constitution of 1851 had prescribed a plan to be followed, the Legislature would have been bound to follow the method thus prescribed; but where the Constitution prescribes no plan, the Court is powerless to do so*" (pp. 543, 551).

It will be noted that this case is directly *contra* to the position of our opponents. Here the question is not, "Has the Legislature the power to submit to the people the question whether a convention shall be called?" but, "Would it be a valid exercise of the legislative power if the General Assembly should provide by law (a) for a convention to be called to revise or amend the Constitution of the State?" In Indiana the answer was "No", particularly where (as here) the people had previously rejected the proposed amendment to authorize the Assembly to do that very thing. The case was doubtless cited by the Twenty-Six Lawyers because in their brief they were arguing, not for the calling of a convention by the Legislature, but for the propriety of submitting that question to the people for their determination. This is almost definitely conceded at the end of the Twenty-Six Lawyers' brief where they say:

> "In every given case all doubt could be resolved by submitting to the people the question whether a convention should be held. If this should be done and the vote be in favor of the convention, no objection could be reasonably raised. And if a new constitution were thus evolved, the changes would have been effected in conformity with sound reason and American precedent. . . . The right of the people to hold a convention ought not to be denied on the authority of the Court's Opinion in 1883."

We need hardly say that we deny, with Judge Durfee, the constitutional right of the General Assembly even to submit to the people the question as to whether a convention should be called; but that is not before the Court under the present reference and need not be argued at length. It may be pointed out, however, that even the opposing text-writers, along with the twenty-six lawyers, appear to believe that (assuming, but not conceding, that the convention method is in any wise constitutional) the Legislature is still without power to go further than to submit the question of holding a convention to the people. But even if that should be conceded to be the proper method, Question (a) must still be answered "No", for that provides for the calling by the Assembly and not for the submission of the question to the people.

As a result of the foregoing review of authorities adversely cited, we again assert that although there are such opposing *dicta,* and although there are certain *political* precedents in which the action now contemplated has actually been taken in other States, *there is not in the United States one single judicial decision which has actually held contrary to the Opinion of the Justices in Rhode Island of 1883* upon the point under discussion.

I. Submission of Supporting Authorities

As authorities that that Opinion on the contrary was sound and should be here reaffirmed, in addition to the Opinion of the Justices in Massachusetts and *Bennett* vs. *Jackson* (*supra*, pp. 24, 56), we refer to

State vs. *Kane*, 15 R. I. 395 (*supra*, p. 44);
Higgins vs. *Tax Assessors*, 27 R. I. 401 (*supra*, p. 44);
State vs. *City of New Orleans*, 163 La. Ann. 777 (1927);
Koehler & Lange vs. *Hill*, 60 Ia. 541;
State ex rel. Stevenson vs. *Tufly*, 19 Nev. 391 (1887);
State vs. *McBride*, 4 Mo. 303 (1836);
Cooley, CONSTITUTIONAL LIMITATIONS, 8th Ed. (1927).

No one of the cases above listed is exactly on all fours with the Rhode Island case, but the inferences are clear.

State vs. *City of New Orleans*, 163 La. Ann. 777, 783 (1927) (*supra*).

The question here was whether a certain act purported to be an amendment to the State Constitution. It was held that it was not, but in the course of the opinion the Court spoke as follows:

> "The Constitution, by Section 1, Article 21 expressly points out when and how amendments to the Constitution may be proposed and considered by the legislature and adopted by a vote of the people when so submitted. The manner of proposing and adopting amendments to the Constitution as thus provided is exclusive. The Constitution cannot be altered, changed, affected or amended in any other manner unless express and direct permission is given to the legislature by the Constitution itself."
>
> *Koehler & Lange* vs. *Hill*, 60 Ia. 541 (*supra*).

This case is elsewhere referred to (*supra*, p. 36) but should also be mentioned again here. An amendment was made by the legislative mode, except that differences de-

veloped between the amendment as spread upon the Journal of the House and that finally submitted to vote of the people. The second opinion of the Chief Justice held that the Court had power itself to examine the House Journal, and, a discrepancy being discovered, that the proposed amendment was void, *although it had been approved by a very large majority of the electorate.*

This holding is inconsistent with the theory that nothing is required to amend or alter a Constitution except a majority vote of the qualified electors. From it it necessarily follows that the expression of the popular will, to be effective, must be in the constitutional mode.

State ex rel. Stevenson vs. *Tufly,* 19 Nev. 391 (1887) (*supra*).

The Nevada Constitution required that proposed amendments should be entered upon the Journal of the Assembly. An amendment was proposed in the legislative mode without compliance with this provision. It was, however, voted upon by the people and received a substantial majority for adoption, but it was held that the amendment had not been constitutionally made, the Court saying:

> "We conclude that amendments to the Constitution can be made only in the mode provided by the instrument itself. * * * These provisions were intended to secure care and deliberation on the part of the legislature and people and are exclusive and controlling" (p. 396).

To precisely the same effect is

State vs. *McBride,* 4 Mo. 303 (1836) (*supra*).

As above mentioned, Jameson, Dodd and Hoar are inclined to criticise the Rhode Island rule. To them we oppose Cooley on *Constitutional Limitations.* In the field we are exploring, no commentator stands higher, and this great work has for generations been considered authoritative on subjects within

its scope. In Chapter 3 of the Eighth Edition, at page 84, the rule is stated as follows:

> "In the original States and all others subsequently admitted to the Union, the power to amend or revise Constitutions resides in the great body of the people as an organized body politic, who, being vested with ultimate sovereignty, and the source of all State authority, have power to control and alter at will the law which they have made. But the people, in the legal sense, must be understood to be those who, by the existing Constitution, are clothed with political rights, and who, while that instrument remains, will be the sole organs through which the will of the body politic can be expressed. * * *
>
> "But the will of the people to this end can only be expressed in the legitimate modes by which such a body politic can act, and which must either be prescribed by the Constitution whose revision or amendment is sought, or by an act of the legislative department of the State, which alone would be authorized to speak for the people upon this subject, and to point out a mode for the expression of their will *in the absence of any provisions for amendment or revision contained in the Constitution itself.*"

And at page 81:

> "The people of the Union created a national Constitution, and conferred upon it powers of sovereignty over certain subjects, and the people of each State created a State government, to exercise the remaining powers of sovereignty so far as they were disposed to allow them to be exercised at all. *By the Constitution which they establish, they not only tie up the hands of their official agencies, but their own hands as well; and neither the officers of the State, nor the whole people as an aggregate body, are at liberty to take action in opposition to this fundamental law.*"

Our position could not be better stated.

All of our argument to this point has been upon the as-

sumption that Question (a) is to be read as a part of a plan or scheme of proposed constitutional revision, of which plan all six questions are component and integral parts, i. e., that Question (a) does *not* contemplate the possibility of a revision or amendment of the Constitution without the final submission to the people for their approval or rejection of any Constitution which may be drafted in and approved by the Convention.

J. If Question (a) Is a Separate and Independent Question, Then Even More Emphatically Its Answer Should Be in the Negative.

If, however, each question is separate (and the questions may be so interpreted by this Court), we are confronted by an even more serious situation; for the apparent meaning of Question (a), considered by itself, is, Can the General Assembly provide by law for a convention "to revise or amend the Constitution", *i. e.,* if such a convention were to be called by the General Assembly, *can the convention itself adopt and promulgate an amended or new constitution without any submission of the new instrument to the vote of the people?*

It is perhaps needless to say that if that is the proper interpretation of the question (which we can hardly believe), in our opinion the answer should be, "No". Not only everything we have previously said in the brief, but everything in the history of the state, in the Constitution, or in the Declaration of Rights, as well as the arguments heretofore advanced even by the critics of the opinion of the Justices, is against such a result. A contrary position is in effect a flat negative of the "right of the *people* to make and alter their constitutions of government". It is still more in the teeth of the remainder of Section 1 of Article I, providing, "that the Constitution which at any time exists, until changed by an explicit and authentic act of the whole people, is sacredly obligatory upon all".

True, in two instances, it has been done elsewhere by political action—which emphasizes the caution with which *political* precedents are to be considered authoritative by the Court. Virginia has done it (*supra,* p. 45), but the Supreme Court of that State, although appointed and acting under the provisions of the new Constitution, while admitting its inability to impugn the authority under which it itself was functioning, *expressly declined to pass upon the validity of the Constitution thus imposed upon the people.*

Mississippi has done it. See,

Sproule vs. *Fredericks,* 69 Miss. 898 (1892).

The latter case, so far as we know, is the only one which attempts to justify such a proceeding upon constitutional principles. The opinion is in the nature of a deification of a Constitutional Convention which is described as a

> "sovereign body—the highest legislative body known to free men in a representative government. It is supreme in its sphere. It wields the powers of sovereignty especially delegated to it for the purpose. * * * The sole limitation upon its powers is that no change in the form of government shall be done or attempted. The spirit of Republicanism must breathe through every part of the framework, but the particular fashioning of the parts of the framework is confined to the wisdom, the faithfulness, and the patriotism of this great convocation representing the people in their sovereignty. * * *" (p. 904).

There is much more in the same strain. It is perhaps enough to say that the Court of Mississippi stands alone in approving any such annihilation of the ultimate right of the people to determine their own form of government. The general and correct view of this type of proceeding is set forth in Lobingier, *"The People's Law",* 1909, at pages 330-337. "V. The Legal Necessity of Submission". To the same effect see, among other cases,

Carton vs. *Secretary of State,* 151 Mich. 337;
State vs. *Erickson,* 75 Mont. 429 (1926).

And even in *Wood's Appeal,* 75 Pa. St. 59, upon which our opponents particularly rely, it is held that the convention could not take from the people their sovereign right to ratify or reject the Constitution framed by the Convention.

Emphatically, there is no word or phrase in the Constitution of Rhode Island, and there is nothing in our history, even during the turbulent days of the Dorr war, from which it can be supposed that our fathers intended their liberties thus to be placed at the mercy of an *extra*-constitutional body of delegates selected by a Legislature elected without any such mandate. If Question (a) is to be interpreted as contemplating any such catastrophe, it should unquestionably be answered, "No." And for the sake of certainty and clearness upon a point vital to the safety of the Republic, we venture earnestly to suggest that *if, contrary to our contention, this Court should feel that Question (a) should be answered in the affirmative upon the assumption that it is a part of a general plan contemplating and necessarily leading to the submission of any new Constitution to the people, it should take care that any such affirmative answer should be so qualified and limited that no one can suppose that a convention so called would have original and final power itself to adopt, promulgate and declare effective the results of its labors without submission to the whole people for their approval.*

K. Summary of Point II

We summarize this point as follows:

1. A constitution is a social compact among all the people. It is by its terms the supreme law of the state and therefore there can be no other law over it. It is the delegation of sovereign power to agents who can take no action, except as specified therein, for its alteration or abolishment. Binding on both majority and minority, it can be legally changed

only in accordance with its terms, except by a revolutionary process, peaceable or otherwise, for what lies outside the constitutional provisions is no part of the social compact, and there is no natural legal right that the majority can impose its will upon the minority.

2. Article I, Section 1, is to be read in connection with Article XIII, and the latter designates the explicit and authentic act of the whole people necessary for amendment or revision.

3. These principles are supported by the entire history of the Constitution:

(a) It is inconceivable that had the Convention method been intended, it would not have been specifically provided for.

(b) The method now proposed has never been attempted during the ninety-two years the Constitution has been in effect.

(c) The constitutional method has been successfully used twenty-one times, and has also been followed in all cases where amendments were rejected.

(d) The people have themselves construed the Constitution upon the point by rejecting a proposal to amend it in such manner as to permit use of the convention method, both through the mode of a direct call by the Assembly, and that of submitting to the people the question of holding such a convention.

(e) For over fifty years even the leaders of the opposing party have made no move and introduced no resolution providing for the direct call of a convention by the General Assembly.

(f) The people have acquiesced in the position which we now take.

4. The foregoing principles are not affected by Section 10 of Article IV for reasons both historic and logical, the legislative power in question having been impliedly prohibited by the Constitution.

5. This position is supported by the authority of our own Supreme Court, of the Supreme Court of Massachusetts, and other cases, and there are no judicial decisions holding the contrary.

6. A constitutional prohibition can be implied as well as expressed, and is here necessarily implied.

7. Precedents of a political, but not of a judicial, nature in other states are without judicial bearing.

8. If, notwithstanding the foregoing, the Court should consider that the General Assembly has power to call a Constitutional Convention, and should therefore answer Question (a) in the affirmative, the answer should be clearly qualified so as to make it certain that no amendment or new constitution can become effective unless approved by the whole body of the people through their vote thereon upon the legal submission thereof to them for that purpose.

9. The answer to Question (a) should therefore be in the negative.

III. THE QUESTION OF THE LEGAL RIGHT OF THE GENERAL ASSEMBLY TO SUBMIT TO THE PEOPLE THE QUESTION, WHETHER A CONSTITUTIONAL CONVENTION SHOULD BE CALLED, IS NOT NOW BEFORE THE COURT.

It seems to us to be clear that as Question (a) asks whether the General Assembly may provide by law for a Convention to be called it cannot be interpreted to inquire whether the Assembly can submit to the people the question whether a Convention can be called, and we therefore do not go into this question at length, as it is not now before the Court for inquiry. It is perhaps proper to state, however, that should the Court be of the opinion that this question is within the scope of its investigations, we are just as clearly of the opinion that that question should also be answered in the nega-

tive, and we submit that the arguments and authorities above referred to will equally well serve to demonstrate the legal impropriety of proceeding in that manner under our Constitution.

IV. THE INTERPRETATION OF THE QUESTIONS.

If the Justices—notwithstanding the current of authority—should say that it is not necessary for the Assembly to ask "the people" if they want a convention then, at least, the Justices should make it plain and unmistakable just what question or questions they are answering—that is to say does the communication from the Governor involve one question, with related and interdependent component parts so that an affirmative answer would mean that no constitutional change proposed by a convention can become effective, whatever other of the specific provisions may be included in an Act, unless a provision for submission to "the people" shall be included and until a submission to "the people" shall have been made and their approval expressed, or

does the communication from the Governor involve several distinct and separate questions so that affirmative answers would mean that an act which provided for one or more, but not all, of the specified provisions might lead to the promulgation of constitutional changes without previous reference to and approval by "the people."

In order that it may be unequivocally established just what the Governor's communication means and what the answer of the Justices may signify it is necessary that the Justices should be asked this question—

Does the Governor's communication mean that he asks, and will your opinion mean that you answer the following comprehensive question, or does that communication mean that the Governor asks and that your answers will mean that you answer several questions which are not necessarily re-

lated and interdependent and that it will not be necessary for the Assembly, to include in an act a provision that any constitutional change which may be proposed by a Convention must be submitted to and approved by "the people" before the same becomes effective?

Therefore it is necessary that this Court should announce whether the following is a correct expression of the true import and meaning of the Governor's inquiry—

Would it be a valid exercise of the legislative power if the General Assembly should provide by law—

for a convention to be called to propose a revision of or amendments to the Constitution of the State;

for the Governor to call for the election, at a date to be fixed by him, of delegates to such convention in such number and manner as the General Assembly shall determine;

for the inclusion of the General Officers of the State in the membership of such convention by virtue of their offices;

for the organization and conduct of such convention;

for the submission to the people, for their ratification and adoption or rejection, of any constitution or amendments proposed by such convention; and

for declaring the result and effect of the vote of the electors voting upon the questions of such ratification and adoption or rejection;

if such law shall contain the provision that no revision of said constitution or amendments thereto which shall be proposed by such convention shall become effective unless the same shall have been first submitted to the people as aforesaid and unless a majority of the electors voting thereon shall have voted ratification and approval thereof?

V. QUESTIONS (b), (c), (d), (e), AND (f) SHOULD BE ANSWERED IN THE NEGATIVE.

It is quite plain that if we are correct in the position that Question (a) should be answered in the negative, each of the other questions must also be answered negatively. These latter questions all proceed upon the primary premise that a convention is to be called by the General Assembly, and upon that assumption inquire as to whether various steps and methods can be taken and employed with respect to its calling, organization, personnel, conduct, submission to the people of proposals, and declaration of result and effect.

For example, Question (b) inquires relative to method of election of delegates "to such Convention"; (c) relative to the legality of the appointment by the Legislature of certain members "of such Convention"; (d) relative to the organization of "such Convention"; (e) relative to the submission to the people of any Constitution proposed by "such Convention"; and (f) relative to the method of declaring the result and effect of the vote upon "such ratification and adoption". The point need not be labored. We see no escape from the obvious conclusion that if the answer to Question (a) is, "No," the answer to the remaining questions is also negative.

VI. ASSUMING, FOR THE SAKE OF ARGUMENT ONLY, THAT QUESTION (a), WITH PROPER QUALIFICATIONS, BE ANSWERED AFFIRMATIVELY, QUESTION (b) SHOULD THEN BE ANSWERED IN THE AFFIRMATIVE WITH CERTAIN QUALIFICATIONS.

It is necessary, however, for the sake of the argument, to assume (without for a moment conceding) that this Court may not find itself in agreement with our position under

Question (a); and upon that assumption it is proper to advert in detail to the remaining questions.

As to Question (b): Assuming that this Court should rule that the General Assembly may validly provide by law for a Convention to be called to revise or amend the Constitution, it is our position that Question (b) still cannot be answered in the affirmative without some qualification.

As we see it, the General Assembly would then be proceeding upon an *extra*-legal basis and would be acting, according to Mr. Jameson and some other text-writers, as the delegated agents of the people to provide for the calling of a convention. For that purpose, as we understand the procedure in such anomalous instances, the delegation is to the General Assembly and not to the executive, and our view would be that the General Assembly, and not the Governor, should call for the election of delegates and should fix the date for the holding of such convention. We further presume that in such event it would be competent for the General Assembly to designate the number of delegates and the manner of their election, subject to the important proviso that the manner of their election and their qualifications, and the number apportioned to the various districts in the state, should be so arranged as to provide a body truly representative of the whole people.

VII. QUESTION (c) SHOULD BE ANSWERED IN THE NEGATIVE.

Question (c): This question inquires whether the Assembly can validly provide "that the General Officers of the State shall by virtue of their offices be members of such Convention?"

As to the proper answer to be given to this question, we believe there cannot be the slightest doubt. It should clearly be answered in the negative.

Discussing this matter, as we must at this point, upon the theory of those who have always maintained the propriety of calling a Constitutional Convention, even those persons have never, so far as we are aware, claimed that the General Assembly could pack the Convention with its own nominees. That would be especially unfair where all of the Assembly's delegates are members of a single political party.

By hypothesis, and under any sensible interpretation of Section 1 of Article I, even if the same be applicable in this situation, the only theory upon which the delegates can be chosen is that they are the representatives of the whole people. Their selection is at best *extra*-legal and *extra*-constitutional—they would attend solely because they had been delegated as representatives of the people, with authority to act only upon the precise question before the Convention, *i. e.,* the framing of an amendment to the Constitution.

But the general officers of the state—the Governor, Lieutenant-Governor, Secretary of State, General Treasurer, and Attorney-General, are neither *extra*-legal nor *extra*-constitutional. They are officers appointed under and not outside of the Constitution, and their powers and duties are clearly defined. Those powers and duties in no case can, by any stretch of the imagination, or of judicial interpretation, be considered to extend to acting as delegates of the whole people in the deliberations of a Constitutional Convention.

The only possible argument which occurs to us which might be proffered in opposition to our contention is that, since the general officers are elected by popular vote, they are therefore representatives of the whole people. The argument is specious. True, they have been elected by the

franchise of the people, but they have been elected under the Constitution, with power to do those things and those only which fall within the constitutional definitions of, and limitations upon, their department and powers. All are unquestionably members of the Executive Department, and the powers and duties of that Department cannot trench upon either the legislative or the judicial departments; nor, *a fortiori,* upon an outside sovereign power.

Taylor vs. *Place*, 4 R. I. 324.

It is submitted that while the nature of the powers of a Constitutional Convention is difficult to define (under the cases), it can truly be said that the purpose of such a Convention is the drafting and recommendation of a Constitution or of amendments thereto; and that being the case, it appears a fair corollary that its labors are in their nature rather legislative than executive or judicial.

Looking at the matter a little more broadly, however, if the Legislature can appoint five delegates, why not ten? And if ten, why not fifty? Once establish the principle that delegates to a Constitutional Convention can be directly appointed by the Legislature, then, on principle, there is no stopping short of its power to appoint *all* the delegates, or to declare *itself* to be a Constitutional Convention, and thereupon to submit a new Constitution to the people at any time at its own pleasure.

That, however, has been held to be unlawful and unconstitutional in a case often cited by our opponents, namely,

Ellingham vs. *Dye*, 178 Ind. 336-443 (1912).

In that case the Legislature assumed itself to frame a new Constitution for the people, and to submit it to them for adoption without the intervention of a Constitutional Convention. It was *held* that the Legislature had no power to propose a new Constitution other than in the specified mode

prescribed therein, and that the Secretary of State and other officials would be enjoined from preparing ballots and performing other acts with reference to submitting the proposed new Constitution to the people.

In *Baker* vs. *Moorhead,* 174 N. W. 430 (Nebraska, 1919), the Court said:

> "The enactment is to be construed as mandatory, so that a statute, allowing the Governor to appoint members of the convention, or providing that they shall be chosen by the Legislature itself, or in any manner other than by ballot at a free election by all qualified voters of the state, *would be unconstitutional.*"

And see *Livermore* vs. *Waite,* 102 Cal. 113 (1894).

Even Jameson, the text-writer most often cited against our main position, has nothing but criticism for the theory that the Assembly may itself appoint delegates. In his book on "CONSTITUTIONAL CONVENTIONS", 4th Edition, he points out that Georgia is the only state in which that method was tried (in 1788—just after the Revolutionary period). In that early instance the delegates were chosen directly by the Legislature and Mr. Jameson says:

> "The case of the Georgia convention of 1788 to which the delegates were chosen directly by the Legislature, it need not be said, was a violation of all principle, and as a precedent would be fraught with extreme danger. So universally has this action of the Georgia legislature been discountenanced that it has never been imitated in that or any other state."

He then distinguishes the action in Rhode Island, in which, in the adoption of our present Constitution, those who would be *electors* under the new Constitution, were allowed to vote, stating that it was—

> "clearly a wise exercise of its legislative discretion to extend the franchise to those citizens whose just discontent had lately precipitated them into a revolution."

Careful search has produced no judicial authority which so much as intimates the propriety of the election of delegates to a Constitutional Convention by the Legislature, and we believe that no such authority can be found. It is contrary, therefore, alike to the provisions of Section 1 of Article I, to precedent, to legal decision, and to the most elementary principles of Constitutional government. We confidently assert that whether or not Question (c) is to be approached singly or as a part of a general plan of procedure embracing all the questions, the answer to that question must be in the negative.

VIII. UPON THE ASSUMPTIONS MADE UNDER VI QUESTIONS (d), (e) AND (f) SHOULD BE ANSWERED IN THE AFFIRMATIVE, BUT WITH PROPER QUALIFICATIONS.

The fourth question is as to the validity of the exercise of legislative power:

> "(d) For the organization and conduct of such convention."

Assuming the validity of "such a Convention" at all, reason and authority suggest to us no objection to proper action by the General Assembly for its organization along the usual lines followed in such cases.

The next question inquires as to the power of the Assembly to provide—

> "(e) For the submission to the people for their ratification and adoption of any constitutional amendments proposed by such Convention."

Upon the same assumptions as before, and further assuming that such a Convention can constitutionally be called by the Legislature, it appears proper, and indeed absolutely necessary, on principle and authority, that the constitutional amendments framed by the Convention should be submitted to the people for their ratification, adoption or rejection. As

rejection is not mentioned in the question, perhaps the Court, in answering that question (if it should be answered affirmatively) should qualify their answer in that particular.

The last question inquired as to the power of the General Assembly to provide by law—

> "(f) For declaring the result and effect of the vote of a majority of the electors voting upon the question of such ratification and adoption?"

The meaning of the question is not as clear as could be wished. We are uncertain what meaning is intended by the words, "declaring the result and effect of the vote of a majority of the electors". Our position is, and must remain, flatly, that under our Constitution changes can be constitutionally and legally made only by a three-fifths vote of the whole people and in the mode prescribed in Article XIII. If it is ruled otherwise, and we are proceeding, not under Article XIII but in the *extra*-legal method, is the three-fifths vote of the people still required to adopt? Our own view would be, Yes—that the Constitution plainly contemplates that it is not to be changed except by the indicated proportion of electors, and that it is not competent for the General Assembly to declare that any other or smaller proportion, can, consistently with the Constitution, make such changes. If Question (f) were answered in the affirmative, without qualification, the Assembly might consider it competent to declare any one of the following results to be in effect:

> (a) that a vote of the majority, but less than three-fifths, resulted in the adoption of the new Constitution;
>
> (b) that the same vote did not result in the adoption of a new Constitution;
>
> (c) that a three-fifths' majority either did or did not so result;
>
> (d) that the entire vote was without effect.

All of these results are strictly and logically possible under the rather loose wording of Question (f). We submit that

while, broadly speaking, the question may (without conceding our general contention) be decided by this Court to call for an affirmative answer, any such answer should contain rigid qualifications making it clear that any action by the General Assembly along the lines contemplated would not be a valid exercise of the legislative power unless it truly reflected and confirmed the action of the electors, whether a majority or three-fifths, as the Court may decide to be the Constitutional proportion required.

IX. CONCLUSION.

In conclusion, we reiterate our settled and sincere belief that all of the questions ought to be answered in the negative, and that only in that way will or can the true meaning of our Constitution be definitely and finally established. A mode of amendment is prescribed, no crisis impends, no revolution —even a peaceful or quasi-legal one—is necessary. If changes are required, they can be made in the future as they have been in the past in the Constitutional mode. Nothing more certainly establishes the respect of the people for, and their reliance upon the opinions of, the judiciary than its acceptance of the guidance of long-settled precedent, usage and authority. The alternative, as we have pointed out, is not final settlement, but the certainty of continued doubt and agitation as to the true interpretation of our supreme law.

We have found no expression better representing our feelings in the matter than the remarks of counsel in *Ekern* vs. *McGovern*, 142 N. W. Rep. (1913), at page 611, quoted by Marshall, J., as follows: "When discontent, violence and anarchy shall succeed to law and order,—when the people and public officers shall depart from the Constitution and desert the ship of state, I have a hope that the last glimpses that will be caught of organized government will be the judiciary, —that courts may be here as long as any vestige of a state

shall remain; still ready to direct, — still speaking the law with an even mind, dispensing justice with an even hand, sitting serene and unmoved above the influence of fear and faction, still abiding by the motto so peculiarly their own,—*'Fiat justitia, ruat coelum'."*

Respectfully submitted,

FREDERICK W. TILLINGHAST,
ELMER S. CHACE,
Amici Curiae.

RE QUESTIONS SUBMITTED BY HIS EXCELLENCY THE GOVERNOR TO THE SUPREME COURT FOR ITS OPINION IN ANSWER TO CERTAIN QUESTIONS CONCERNING A CONSTITUTIONAL CONVENTION

Brief of Russell W. Richmond, Esq.

In Support of a Negative Answer

Re Questions Submitted By His Excellency the Governor to the Supreme Court for Its Opinion in Answer to Certain Questions Concerning a Constitutional Convention.

STATEMENT

The Questions submitted by His Excellency the Governor are as follows.

"Would it be a valid exercise of the legislative power if the General Assembly should provide by law

"(a) for a convention to be called to revise or amend the Constitution of the State;

"(b) that the Governor shall call for the election, at a date to be fixed by him, of delegates to such convention in such number and manner as the General Assembly shall determine;

"(c) that the General Officers of the State shall by virtue of their offices be members of such convention;

"(d) for the organization and conduct of such convention;

"(e) for the submission to the people, for their ratification and adoption, of any constitution or amendments proposed by such convention; and

"(f) for declaring the result and effect of the vote of a majority of the electors voting upon the question of such ratification and adoption?"

QUESTION

In this argument I propose to discuss from the legal standpoint only the questions, namely,

Can the General Assembly by *legislative* act validly—that is constitutionally—call a constitutional convention, supervise its organization and give validity to its findings on approval by a majority vote of the electors of the state.

POINT

THE CONSTITUTION OF RHODE ISLAND CAN BE LAWFULLY AMENDED OR CHANGED ONLY IN THE MODE WHICH ITSELF PRESCRIBES.

Article XIII entitled "Of Amendments" sets forth the one method in clear language and with great detail. No mention of a constitutional convention is made in this or any other article of the constitution.

The statement of law involved in this question and which I have herein set forth is contained in a former advisory opinion of this court rendered in 1883.

In re Constitutional Convention 14 R. I. 649.

While it is true that such an opinion has not the binding effect of a decision (*Taylor* vs. *Place,* 4 R. I. 324) yet it is entitled to great weight in view of the cogency of its reasoning and the further fact that it enunciates and establishes a well settled principle of law which many courts and text writers have adopted in construing the power of legislatures to change or alter or amend a constitution.

This principle is stated as follows:

WHERE A CONSTITUTION PRESCRIBED THE METHOD BY WHICH IT MAY BE AMENDED SUCH CONSTITUTION MAY BE CHANGED ONLY BY THE METHOD PRESCRIBED.

Switzer vs. *State,* 103 Ohio State 306, *316;*
Johnson vs. *Craft,* 205 Ala. 385;
Oakland Paving Co. vs. *Hilton,* 69 Cal. 479;
Livermore vs. *Wait,* 102 Cal. 113;
Koehler vs. *Hill,* 60 Ia. 543;
State vs. *Marcus,* 160 Wis. 354;
Wells vs. *Bain,* 75 Pa. 39;
6 R. C. L. 31 Par. III and cases cited;
12 C. J. 682.

The reasons for reaching the above sound conclusions seem to be three in number.

(1) The amending article prescribes and defines the course to be pursued in the exercise of the sovereign's right to alter and change its constitution.

The very term constitution implies an instrument of a permanent and abiding nature whence the provisions therein for revision implies the will of the people that the underlying principles shall be of a like permanent and abiding nature. Therefore, the amending provisions in a constitution prescribe and define the course to be pursued in the exercise of the inherent power of the people to alter and change their basic law.

Livermore vs. *Wait, supra;*
Switzer vs. *State, supra;*
Johnson vs. *Craft, supra;*
Erwin vs. *Nolan,* 280 Mo. 401, *407.*

(2) The power to propose amendments is not legislation.
State vs. *Marcus, supra;*
Hollingsworth vs. *Virginia,* 3 Dall (U. S.) 378;
Oakland Paving Co. vs. *Hilton, supra.*

(3) The constitution expressing one thing in the sense of specifying excludes things not expressed.

In re Constitutional Convention, 14 R. I. 649.

Applying the foregoing principles and reasoning to Rhode Island's constitution, we can only reach the following conclusions.

1. All sovereignty is vested in the whole people of the state. R. I. Constitution Article 1, Sec. 1.

2. The present constitution is the will of the sovereign in Rhode Island. Every word of it is the sovereign will, and it is the sole knowledge we have of the sovereign will.

3. This constitution "till changed by an explicit and authentic act of the whole people, is sacredly obligatory upon all."

4. The sovereign will has restricted the General Assembly in remaking, altering, or amending the constitution to the one, sole, and only method prescribed in Article XIII.

5. It is the sovereign will not to be invoked in any other manner.

6. The questions submitted by the Governor must all be answered in the negative.

CONCLUSION

Because the General Assembly would not be acting under its *legislative* power, is limited in the exercise of its amending power to the method prescribed, and can not delegate any of its powers to the Governor or any other person, it can not, in the valid exercise of any power it has, expressed or implied in the constitution, provide by law or legislative enactment, for a convention to be called to revise or amend the Constitution of the State, or for other details concerning such a convention and its organization, functions, powers, etc., as set forth in His Excellency's Questions. Hence, these questions should all be answered in the negative.

Respectfully submitted,

RUSSELL W. RICHMOND.

State of Rhode Island
Providence, Sc.

Supreme Court

Re: GOVERNOR'S REQUEST FOR OPINION OF THE SUPREME COURT ON CERTAIN QUESTIONS RELATIVE TO AMENDMENT OF THE CONSTITUTION

BRIEF OF ZECHARIAH CHAFEE IN SUPPORT OF THE NEGATIVE SIDE

State of Rhode Island
Providence, Sc.

Supreme Court

Re: Governor's Request for Opinion of the Supreme Court on Certain Questions Relative to Amendment of the Constitution.

BRIEF OF ZECHARIAH CHAFEE IN SUPPORT OF THE NEGATIVE SIDE

Replying to a request that briefs be submitted to the Court by others than members of the Bar, I respectfully present the following brief:

The questions submitted by the Governor to the Court are interesting. Their immediate purport is somewhat startling, and this is the point to which I would especially ask the attention of the Court:

The questions submitted by the Governor are the following:

> "Would it be a valid exercise of the legislative power if the General Assembly should provide by law
>
> "(a) for a convention to be called to revise or amend the Constitution of the State;
>
> "(b) that the Governor shall call for the election at a date to be fixed by him, of delegates to such convention in such manner and number as the General Assembly may determine;
>
> "(c) that the General officers of the State shall by virtue of their offices be members of such convention;
>
> "(d) for the organization and conduct of such convention;

"(e) for the submission to the people, for their ratification and adoption, of any Constitution or amendments proposed by such convention; and

"(f) for declaring the result and effect of the vote of a majority of the electors voting upon the question of such ratification and adoption?"

OUTLINE OF ARGUMENT

POINT I

Question (f) should be answered in the negative

POINT II

Question (c) should be answered in the negative

POINT III

Question (d) should be answered in the negative

POINT IV

A Convention should not be called. There is no urgent necessity or preponderant public opinion calling therefor.

ARGUMENT

POINT I

Question (f) should be answered in the negative

The policy underlying the questions is that the Constitution be reshaped and rewritten, not solely by a Constitutional Convention, but to a very considerable extent by the Legislature itself in advance of a Constitutional Convention.

Let us look at Question (f) for example.

Article XIII of the Constitution says that approval of amendments by the people shall be by 3/5ths of the electors of the State present and voting in Town and Ward meetings. Question (f) contemplates that such approval shall be by a bare majority of the people. Such a change is,

in my judgment, unconstitutional and an impairment of a safeguard to which I have been accustomed as against hasty legislation.

Under cover of a Constitutional Convention other proposed amendments by the Legislature in advance of a constitutional Convention come to mind. The work of a Constitutional Convention, if held under this plan, would be written in advance by the Assembly to a very considerable extent.

Such a procedure for amending the Constitution I do not think is anywhere contemplated in the Constitution.

POINT II

Question (c) should be answered in the negative

Question (c) contemplates a procedure which is somewhat lacking in its appeal to common sense. Administrative Officers are not ex-officio members of a legislative body or of a body to which legislative prerogatives have been delegated. The Legislature cannot make the Governor or others members of the Legislature. That comes through vote of the people. If the Governor and others wish to be members of a body exercising legislative functions the proper course is for them to present themselves as individuals to the electors and stand or fall by the judgment of the electors as to their suitability for any desired position. The Legislature is going beyond its function when it proposes to stack the cards as to membership in a Convention ostensibly to be filled by candidates selected from and by the people.

POINT III

Question (d) should be answered in the negative

Question (d) conferring upon the Legislature power to arrange for the organization and conduct of a Constitutional Convention opens the door for rewriting the Constitution in advance in many particulars by the Legislature.

POINT IV

A Convention should not be called. There is no urgent necessity or preponderant public opinion calling therefor.

We have been repeatedly told that the divergence from Article XIII and the calling of the Constitutional Convention was justified by the fact that there is an overwhelming public sentiment in favor of a change in our Constitution, and that this sentiment cannot have effect while our Legislature is as at present constituted. This statement, it should be noted, is not correct. Question (f) submitted by the Governor to this Court is enlightening in this connection. It discloses the fact that in the Governor's judgment there is not an overwhelming desire for the changes which he expects to be presented to the people. He reduces the popular vote necessary for confirmation from 3/5ths to a bare majority. The desire for haste on the part of the Governor and his associates further shows his lack of confidence in a persistent and continuing public sentiment which would retain in a coming legislature the present preponderance of votes for the desired changes.

Haste to seize a special opportunity, and narrow margins in popular vote for adoption, are not consistent with the tenor of our Constitution, with Article XIII or for the good of the State as a whole.

Nor is it correct to say that our Constitution cannot be amended as it now stands. Such a statement is contrary to experience. It has been amended many times within my own experience. The arguments now adduced have been adduced many times and shown by time to be unjustifiable. I recall what was said about the Bourne amendment and about Women's Suffrage.

Amendments have come in response to definite and permanent phases of opinions. The process is perfectly natural

and inevitable when the preponderance of our people have certain convictions and continue to hold them. There is a weight of public opinion which invariably produces the votes necessary for the amendments in the Legislatures and in popular elections. At the moment adequate popular sentiment is lacking for the desired changes.

Having been brought up in Rhode Island I have a respect for the authors of the Constitution and for those who gave their approval to this document. I believe these gentlemen knew what they wanted to say and said it plainly and not by implication. Article XIII, to my mind, was made to stand and does stand until changed as therein provided.

The Legislature cannot delegate to any Assembly privileges which it does not itself possess. It cannot exclude from any Assembly any of the obligations by which it is itself restricted. It cannot by itself amend the Constitution.

Article IX also, I believe, was made to stand and does stand. Article IX and Article XIII to my mind are not disunited. I quote them as important considerations now before the people and before the Court. I ask adherence to them, and certainly there is no necessity or overwhelming popular sentiment which justifies the lessening of any of the safeguards customarily attending amendments of the Constitution.

Article IX, Sections 3 and 4 of the Constitution of Rhode Island reads as follows:

> Sec. 3. All general officers shall take the following engagement before they act in their respective offices, to wit; You.....being by the free vote of the electors of this State of Rhode Island and Providence Plantations, elected unto the place of.....do solemnly swear (or affirm) to be true and faithful unto this state, and to support the constitution of this state and of the United States; that you will faithfully and impartially discharge all the duties of your aforesaid office to the best of your abilities, according to law: So

help you God. Or, this affirmation you make and give upon the peril of the penalty of perjury.

Sec. 4. The members of the general assembly, the judges of all the courts, and all other officers, both civil and military, shall be bound by oath or affirmation to support this constitution, and the constitution of the United States.

Article XIII reads as follows:

The general assembly may propose amendments to this constitution by the votes of a majority of all the members elected to each house. Such propositions for amendments shall be published in the newspapers, and printed copies of them shall be sent by the secretary of state, with the names of all the members who shall have voted thereon, with the yeas and nays, to all the town and city clerks in the state. The said propositions shall be, by said clerks, inserted in the warrants or notices by them issued, for warning the next annual town and ward meetings in April; and the clerks shall read said propositions to the electors when thus assembled, with the names of all the representatives and senators who shall have voted thereon, with the yeas and nays, before the election of senators and representatives shall be had. If a majority of all the members elected to each house, at said annual meeting, shall approve any proposition thus made, the same shall be published and submitted to the electors in the mode provided in the act of approval; and if then approved by three-fifths of the electors of the state present and voting thereon in town and ward meetings, it shall become a part of the constitution of the state.

Respectfully submitted,

ZECHARIAH CHAFEE,
5 Cooke Street,
Providence, Rhode Island.